STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 25, 2006
v	No. 256368 Monroe Circuit Court
MICHAEL J. HOLBROOKE, Defendant-Appellant.	LC No. 02-032524-FH

Before: Markey, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of arson of a dwelling house, MCL 750.72, and second-degree home invasion, MCL 750.110a(3). He was sentenced to concurrent prison terms of 20 to 40 years for the arson conviction and 9 to 40 years for the home invasion conviction. Defendant appeals as of right, and we affirm.

On October 19, 2002, Bessie Grodi left her home at approximately 5:30 p.m. She locked the doors to her house. Her purse, which she had left inside the entryway, could be observed from the front door. When Grodi returned home between 6:15 and 6:30 p.m., she observed a green car speeding quickly out of her yard. The back door of her home had been smashed open and the fire alarm was sounding. The house had been ransacked. Separate fires, which were later determined to have been deliberately set, were burning in the bathroom and in a closet near the kitchen. Grodi was unable to call the fire department because the kitchen telephone was missing. A gray and tan safe, which had been in the closet near the kitchen, had been stolen from the home.

Grodi's neighbors, William and Susan Orth, observed a 1996 green Ford Contour parked very close to Grodi's house on the day the house was broken into and the fires were set. The car had visible damage to its right side and was missing its right rear window. Its trunk was open and an object, which looked like a tan cooler, was inside. Two men were observed near the vehicle. After driving past Grodi's house, the Orths turned around and went back to talk to the men. Before they could do so, however, the green Contour sped out of the driveway. William followed the car, which had Ohio bicentennial license plates. After a short distance, he and Susan decided to abandon their chase and return to Grodi's house. When they returned, they noticed that the house was on fire. Grodi was inside, and William tried to help her extinguish the bathroom blaze. When the smoke became too heavy, they left the home.

James Connors, who was charged with burglary and arson related to the incident, testified that he knew defendant from a crack house located at 652 Sylvania Avenue in Toledo, Ohio. Defendant, Gregory Herfurt, and Danette Salazar lived at the home. On October 19, 2002, while Herfurt was in jail, Connors partied with defendant and Salazar. When the group ran out of money for crack cocaine, Connors and defendant took Herfurt's car and went to find more money. Connors testified that defendant wanted to go to Michigan to steal tools from a work truck. Defendant told Connors, who was driving, to pull off at a particular exit. Connors did so. He then pulled into the first driveway near the expressway. He and defendant exited the vehicle and looked into the house. They then backed the car up the driveway, maneuvering it as close to the back of the garage as possible. Thereafter, defendant entered the house while Connors waited outside. Approximately 15 minutes later, defendant rolled a large safe to the back door. Connors assisted defendant in putting the safe into the trunk of the car. Defendant also stole approximately $200 and a jewelry box from the home. Defendant told Connors that he lit the house on fire because his fingerprints were all over the place.

Herfurt testified that he owned a 1996 Ford Contour with Ohio license plates. The car had right-side damage, and the rear passenger window was broken. After he was released from jail, the police came to 652 Sylvania Avenue and confiscated Herfurt's car. When Herfurt confronted defendant about his car, defendant made statements like the "jig" was up or "it's over." Herfurt subsequently decided to speak with the police and consented to a search of 652 Sylvania Avenue. He told the police that the safe was in the basement and that a bag containing Grodi's papers was in a drop ceiling in the kitchen.

I

Defendant argues that the trial court erred in denying his motion for a mistrial after the prosecutor informed the jury of his prior imprisonment. The denial of a motion for a mistrial is reviewed for an abuse of discretion. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant . . . and impairs his ability to get a fair trial." *Id.*, quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

A prosecutor's intentional injection of a defendant's prior incarceration into trial constitutes error. *People v McGee*, 90 Mich App 115, 116-117; 282 NW2d 250 (1979). However, "an isolated or inadvertent reference to a defendant's prior criminal activities will not result in reversible prejudice." *People v Wallen*, 47 Mich App 612, 613; 209 NW2d 608 (1973). See also *People v Griffin*, 235 Mich App 27, 35-37; 597 NW2d 176 (1999), in which this Court held that a "brief incidental mention" that a defendant was previously incarcerated did not warrant a mistrial in circumstances where a witness was specifically instructed not to mention that the defendant had been in jail and did so anyway. Additionally, a prosecutor's good faith effort to admit evidence does not constitute misconduct that requires reversal. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Defense counsel moved for a mistrial after the prosecutor elicited testimony from Chief William Hines of the Erie Township Police Department that, in effect, informed the jury that defendant had previously been incarcerated. The basis for Chief Hines' testimony included statements that defendant had made to the police, which defendant unsuccessfully attempted to suppress before trial on the ground that the statements were obtained in violation of his right to

counsel. The trial court denied defendant's motion for a mistrial, reasoning that the reference to defendant's prior incarceration was inadvertent, nonspecific, and capable of being cured by a curative instruction.

We conclude that the prosecutor's elicitation of the challenged testimony in this case was not improper and that the trial court did not abuse its discretion in denying defendant's motion for a mistrial. The reference to defendant's prior incarceration was isolated and was never mentioned after the challenged question. Moreover, the prosecutor acted in good faith in eliciting the statement. While she should have been aware of the general prohibition against evidence of prior incarceration, she had prevailed on defendant's motion to suppress his statements to the police, and no argument or ruling was made to preclude the portion now being challenged. The prosecutor reasonably believed that the challenged statement was relevant to the credibility of defendant's other statements and was admissible. Defendant had a motive to accuse others and explain away the presence of his fingerprints. Moreover, the jury heard testimony that defendant lived at a "crack" house, partied with cocaine, and associated with criminals, including Connors, and Herfurt, who was in jail when defendant took the car. In light of that testimony, the isolated reference to defendant's prior imprisonment did not result in harmful prejudice to defendant or his character.

II

Defendant argues that the trial court denied him his right to equal protection and due process by refusing to authorize funds for an investigator. The record does not support the premise on which defendant alleges error. To the contrary, the record demonstrates that the trial court indicated that it was willing to provide funds if the cost was reasonable, and it requested that defense counsel provide the court with information regarding the cost. The record does not demonstrate that defendant followed through in this regard. "[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence[.]" *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 684; 591 NW2d 438 (1998). Because defendant failed to provide the court with information regarding the cost of an investigator, we deem this issue waived on appeal. *Id.* Moreover, in order to demonstrate that a trial court abused its discretion by denying a court-appointed investigator, a defendant must show that, under the facts and circumstances of the case, an investigator was necessary to afford him due process or that the trial court's ruling substantially prejudiced him. *People v Johnson*, 245 Mich App 243, 260; 631 NW2d 1 (2001). Defendant failed to demonstrate any failure of the trial court to afford him due process.

III

Defendant next argues that the trial court erred in refusing to suppress his statements, which defendant maintains were obtained in violation of his *Miranda*[1] rights. We review the trial court's factual findings following a suppression hearing for clear error. *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001). Whether defendant was entitled to *Miranda*

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

warnings when he was driven to Michigan from Ohio presents a question of law. Questions of law are reviewed de novo. *People v Laws*, 218 Mich App 447, 451; 554 NW2d 586 (1996).

Defendant was extradited to Michigan from Ohio. When he was transported to Michigan, he was not initially advised of his *Miranda* rights. When defendant questioned what was happening to him, Chief Hines informed him of the charges against him. Chief Hines did not ask defendant any questions after that time. Defendant, however, made a statement indicating that he had nothing to do with the offense and knew who did. Chief Hines then provided defendant with *Miranda* warnings. Defendant appeared to understand those rights, did not ask for an attorney, and subsequently made further statements. Defendant had not yet been arraigned on any of the offenses for which he was charged in Michigan. Additionally, he was never formally interviewed by the officers after he was returned to Michigan.

"*Miranda* warnings are necessary only when the accused is interrogated while in custody." *Herndon*, *supra* at 395. The warnings are necessary before interrogation. *People v Armendarez*, 188 Mich App 61, 73; 468 NW2d 893 (1991). Custodial interrogation is defined as questioning initiated by law enforcement officers after a defendant is taken into custody. *Herndon*, *supra* at 395-396. It involves "express questioning or its 'functional equivalent.'" *People v Kowalski*, 230 Mich App 464, 479; 584 NW2d 613 (1998). In this case, the record does not reflect that any questioning or statements by the police prompted defendant's first statements regarding the crime. Statements which are made voluntarily are not within the purview of *Miranda*. *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997). The record further reflects that defendant was provided with full *Miranda* warnings before he made any additional statements. Thus, defendant was not entitled to suppression of his statements based on an alleged violation of his *Miranda* rights.

IV

Defendant next argues that the physical evidence seized from 652 Sylvania Avenue should be suppressed because it was seized without a search warrant and the consent to search the premises was invalid. Defendant argues that Herfurt, who provided the consent, did not have authority to do so. He additionally argues that, based on Herfurt's preliminary examination testimony, the consent was not voluntary. We review the trial court's suppression ruling with deference and will not disturb that ruling unless it is clearly erroneous. *People v Callon*, 256 Mich App 312, 321; 662 NW2d 501 (2003). However, if admissibility of the evidence depends on a question of law, our review is de novo. *Id.*

Valid consent is a recognized exception to the search warrant requirement. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999). Whether consent is freely and validly given is a question of fact based on an assessment of the totality of the circumstances. *Id.* There is no violation of the right against unreasonable searches where police officers conduct a search pursuant to the consent of a third party whom the officers reasonably believe has common authority over the premises. *People v Goforth*, 222 Mich App 306, 315; 564 NW2d 526 (1997). See also *United States v Matlock*, 415 US 164, 170; 94 S Ct 988; 39 L Ed 2d 242 (1974), in which the Court stated that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."

In this case, the police conducted surveillance of a house at 652 Sylvania Avenue in Toledo, Ohio, for a couple of days. Herfurt was observed coming and going. He never knocked when entering the home. At the evidentiary hearing, Herfurt testified that he, defendant, and Salazar were "regulars" at the house, which was a flop house occupied by Devie Sharp. Sharp was incarcerated and had given Herfurt verbal control of the house, asking him to make sure that certain people were not allowed at the house. Herfurt received mail at the house and stored his personal property there. He testified that everyone at the house had access to all areas, including the basement, kitchen, bathroom, and bedroom. Defendant did not have his own room in the house, and no one had a superior right of consent or occupation.

Under the totality of the circumstances, we agree that consent was validly and voluntarily given for the search. Herfurt stayed at the house and was given verbal control over it by the absent occupant. He came and went at will, received mail at the house, and stored personal belongings there. Clearly, he had joint access and control over all areas of the house, including the basement where the safe was located. *Goforth*, *supra*.

Additionally, the consent was voluntary. While the presence of coercion or duress militates against a finding of voluntariness, *Borchard-Ruhland*, *supra* at 294, there was no evidence of coercion or duress presented at the evidentiary hearing. Looking at the totality of the circumstances, it is apparent that the consent to search was not the product of duress or coercion. The trial court properly denied defendant's motion to suppress the physical evidence.

V

Defendant argues that the trial court erred in denying his motion to quash the charges against him. He claims that the evidence presented at the preliminary examination did not support a finding that he was the perpetrator. We review a trial court's decision on a motion to quash de novo to determine if the district court abused its discretion in binding the defendant over for trial. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). In order to find an abuse of discretion, the district court's decision must have been so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Id.* However, an erroneous conclusion that sufficient evidence was presented at the preliminary examination is rendered harmless if sufficient evidence is presented to support a conviction at trial. *Id.*

In this case, the testimony at trial was sufficient to establish that defendant was the perpetrator of the crimes for which he was charged. Connors's testimony directly implicated defendant. Additionally, defendant's own statements and actions implicated him in the charged crimes. He denied committing the crimes and claimed that his fingerprints were on the safe and its contents only because he had been cleaning the house. The evidence revealed, however, that the safe was found in a very messy basement. There was no evidence that any cleaning was done. When Herfurt confronted defendant about his missing vehicle, defendant exclaimed that the "jig" was up or "it's over." The evidence was sufficient to establish that defendant committed the crimes.

VI

Defendant next argues that the prosecutor failed to exercise due diligence to produce an endorsed witness and the trial court improperly denied his request for an adverse witness instruction. We review the trial court's decisions regarding the exercise of due diligence and the appropriateness of a missing witness instruction for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004).

When a prosecutor endorses a witness under MCL 767.40a(3), he is obliged to exercise due diligence to produce that witness at trial. *Id.* at 388. Due diligence "is the attempt to do everything reasonable, not everything possible, to obtain the presence of" the witness for trial. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). "The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, and not whether more stringent efforts would have produced it." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). If the trial court concludes that there was a lack of due diligence, the jury should be provided with an adverse witness instruction, advising that it may infer that the missing witness' testimony would have been unfavorable to the prosecution's case. *Eccles*, *supra.*

The prosecutor endorsed Salazar for trial. While it was agreed that she may not be a res gestae witness, defendant wanted her produced for trial because she was in possession of Herfurt's car keys and presumably had information about who took the car on the day of the crimes. The prosecutor represented to the trial court that Salazar could not be located. The Erie Township Police attempted to serve Salazar both in person at 652 Sylvania Avenue and by mail. They also contacted Ohio authorities about her location, checked to determine if she was in jail, checked her last known employment at a strip club business, checked other strip club businesses to ascertain if she was employed, checked Toledo police records for alternative addresses, and twice tried to locate her at an address in a trailer park in Erie Township. Chief Hines spoke with the occupants of the trailer. Neither the police nor the prosecutor could locate Salazar to secure her attendance at trial. The trial court, noting that the efforts to obtain Salazar for trial did not take place at the last minute, determined that Salazar could not be located despite the exercise of due diligence. Therefore, it refused to provide an adverse witness instruction. Based on the record, the trial court did not abuse its discretion in its finding of due diligence and refusal to give an adverse witness instruction.

VII

Defendant argues that the trial court provided an incomplete reasonable doubt instruction to the jury. Preserved claims of instructional error are reviewed de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002).

Defendant argued to the trial court that the standard jury instruction on the presumption of innocence and reasonable doubt, CJI2d 3.2, diluted the concept of the burden of proof. The trial court disagreed and indicated that it would provide the standard jury instruction in its given form. Defendant admits that the trial court provided that standard instruction. This Court has previously rejected claims that CJI2d 3.2 weakens the concept of reasonable doubt. *People v Werner*, 254 Mich App 528, 537-538; 659 NW2d 688 (2002); *People v Snider*, 239 Mich App 393, 420-421; 608 NW2d 502 (2000). Additionally, this Court has repeatedly held that CJI2d 3.2 adequately conveys the concepts of reasonable doubt, the presumption of innocence, and the

burden of proof. *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003). Thus, there was no error.

VIII

Finally, defendant argues that offense variable (OV) 14 of the sentencing guidelines, MCL 777.44, was improperly scored at ten points and that the trial court's scoring of OV 14 violates the rule of law set forth in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). This scoring issue is properly presented for review because defendant objected to the scoring of OV 14 before sentencing. MCL 769.34(10). But the challenge based on *Blakely*, *supra*, is not preserved because it was never raised before the trial court.

A sentencing court has discretion with respect to the scoring of offense variables, provided that the evidence of record supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). OV 14 is scored at ten points where, considering the entire criminal transaction, the offender was a leader in a multiple offender situation. MCL 777.44; *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004). The record in this case revealed that defendant suggested that he and Connors go to Michigan to steal tools. Although Connors drove, Connors claimed that defendant told him which exit to take from the expressway, that defendant entered the victim's house while Connors waited outside, and that defendant located the safe and other items, which were ultimately taken. Defendant also set the fire before leaving the house. Connors and defendant subsequently spoke to Rodriquez because defendant knew Rodriquez had tools to break open the safe. Defendant told Rodriquez to bring the tools to 652 Sylvania Avenue. Defendant and Rodriquez broke open the safe, and defendant hid the victim's papers in a bag in the drop ceiling of the kitchen. These facts were sufficient to show that defendant was a leader in a multi-offender situation and, therefore, support the scoring of OV 14 at ten points. We additionally reject defendant's unpreserved challenge that, based on *Blakely*, *supra*, it was impermissible for the trial court to score OV 14 using facts that were neither admitted by defendant nor found by a jury beyond a reasonable doubt. In *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), the Court correctly indicated that *Blakely* is inapplicable to Michigan's indeterminate sentencing system.

Affirmed.

/s/ Jane E. Markey
/s/ Bill Schuette
/s/ Stephen L. Borrello